

Cleveland State University  
**EngagedScholarship@CSU**



---

Cleveland State Law Review

Law Journals

---

1972

# Serrano: Its Progeny and Its Prophecy

James T. Flaherty

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Education Law Commons](#)

**How does access to this work benefit you? Let us know!**

---

## Recommended Citation

James T. Flaherty, *Serrano: Its Progeny and Its Prophecy*, 21 Clev. St. L. Rev. 104 (1972)  
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol21/iss3/6>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

## *Serrano: Its Progeny and Its Prophecy*

*James T. Flaherty\**

NO COURT DECISIONS SINCE THE *Brown*<sup>1</sup> decrees of 1954 have had such a devastating effect on the educational status quo as has the California STATE AID PROPERTY Tax decision of *Serrano*<sup>2</sup> and its progeny. Here, the California Supreme Court declared that unequal financing of public schools, based primarily on the local property tax, is a violation of the equal protection clause in that it "invidiously discriminates" against the poor.

*Serrano* was rapidly followed by other cases that covered the country from west to east (*Robinson-New Jersey*),<sup>3</sup> and from north (*Van Dusartz-Minnesota*)<sup>4</sup> to south (*Rodriguez-Texas*)<sup>5</sup> all of which followed and adopted the *Serrano* theory and decree, and apparently, had similar pleadings and collaborating counsel. The intermediate *Sweetwater*<sup>6</sup> case of Wyoming which adopted *Serrano* was evidently an unexpected bonus.<sup>7</sup>

The "adopted theory" of *Serrano* starts with the basic situation of the unequal production of net per pupil spendable revenue produced from local property taxes. The inequality is the result of unequal tax assessment valuations due solely to de facto housing and commercial property patterns. When the unequal property values (of school tax districts) are multiplied by the usual millage factor, the expected result occurs—lower revenue for the poorer districts, or a higher-millage rate (to compensate) or both. In other words, ". . . a tax more, spend less system."<sup>8</sup>

To add to the discrimination problems of the poorer districts is the state aid which usually takes two forms. One is the flat grant that goes to every district on a per (student) capita basis, and the other is the equalizing grant designed to give more aid to the poorer tax districts. As the cases show, this latter grant, although it produces spendable income, is generally of little value as to its equalizing effect.<sup>9</sup>

---

\*Professor of Law, Cleveland State University College of Law.

<sup>1</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

<sup>2</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

<sup>3</sup> *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

<sup>4</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 870 (D. Minn. 1971).

<sup>5</sup> *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280 (W. D. Tex. 1971) cert. granted, 92 S. Ct. 2413 (1972).

<sup>6</sup> *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971).

<sup>7</sup> *Id.* at 1238.

<sup>8</sup> *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W. D. Tex. 1971), cert. granted, 92 S. Ct. 2413 (1972). *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 876 (D. Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

<sup>9</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1247 (1971); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234, 1237 (Wyo. 1971); *Van Dusartz v. Hatfield*,

(Continued on next page)

It would be complicated to attempt to show the exact comparable date in each of these cases, especially when it is unnecessary. An example of the basic principle will suffice.

Table I assumes a State with tax districts A, B, and C which respectively represent a rich district, an average district, and a poor district. For the example, the millage rate was set at 20 mills for all, and from there, the table can speak quite effectively.

TABLE I

	District		
	A	B	C
a) Equalized valuation per pupil	\$60,000	25,000	8,000
b) Tax rate (mills)	20	20	20
c) Realized revenue (a x b)	\$ 1,200	500	160
d) State desired level of per pupil spending	\$ 800	800	800
e) State maximum support level (appropriation)	\$ 400	400	400
f) Uniform flat grant	\$ 100	100	100
g) Equalizing grant (d-c-f) (f + g not to exceed e)	\$ 0	200	300
h) Total available per pupil expenditure (c + f + g)	\$ 1,300	800	560

Although the districts and figures are fictional, they do serve to illustrate the basic tax principles in each of these cases. The poorer tax districts, due to lower property (market and taxable) values, produce lower revenue income per pupil. The state aid may produce somewhat more income but considering the fact that the local property tax produces about 98% of the local income,<sup>10</sup> which is 52% of net school revenue (nationally),<sup>11</sup> the state aid programs are not geared to solve the problem. Further, the so called equalization grants do not "equalize", they merely narrow the gap. In Texas, the latter aid exaggerates the gap, which may explain the urgency of that court order.

(Continued from preceding page)

334 F.Supp. 870, 873 (D. Minn. 1971); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

<sup>10</sup> FUTURE DIRECTIONS FOR SCHOOL FINANCING, NATIONAL EDUCATION FINANCE PROJECT, 9 (1971).

<sup>11</sup> *Id.*

Table II shows the results when the poorer district increased its local tax efforts by an increase in its millage rate, as shown in line (b). The rate for A will remain constant, the rate for B is plus 50%, the rate for C is doubled. Thus:

TABLE II

	District		
	A	B	C
a) Equalized valuation per pupil	60,000	25,000	8,000
b) Tax rate	20	30	40
c) Realized rate	1,200	750	320
d) State desired level of per pupil spending	800	800	800
e) State maximum support level (appropriation)	400	400	400
f) Uniform flat grant	100	100	100
g) Equalizing grant (d-c-f) (f + g not to exceed e)	0	0	300
h) Total available per pupil expenditure (c + f + g)	1,300	850	720

As the figures show, the increased local effort still produces a tax more-spend less situation<sup>12</sup> to the detriment of the poorer districts. All the court decisions that adopted this phrase neglected to point out that the "tax more", as applied to the taxpayer means primarily the RATE, not the AMOUNT of tax. Thus, in Table I the (average) taxpayer in district A pays \$1040 (1200-160) more than the (average) taxpayer in district C. When the district C taxpayer DOUBLES his RATE, (Table II) the district A taxpayer still pays \$880 more (1200-320) than the district C taxpayer. Thus, although the district C taxpayer is being taxed at double the rate of district A, he still only pays about one-fourth as much in taxes.

In all likelihood, the district A taxpayer may have a different point of view than these courts as to the meaning of "equal protection" once the implementation of these decisions begin to gel. Since the technique of these decisions was obviously to reach a decision by reason where possible, and by fiat if necessary, the logic argument of the difference between RATE and AMOUNT would have fallen on deaf ears.

After the findings of the factual situations as represented by Tables I and II, the courts next proceeded to find these situations unconstitutional by whatever means possible.

<sup>12</sup> Cf. note 8, *supra*.

The general procedure is to declare that any classifications based on wealth are suspect,<sup>13</sup> and cases are cited to show prior decisions giving relief to indigents and the poor in matters of poll tax, court transcripts, and legal counsel.<sup>14</sup> The courts must now find that the education of the youth is in this protectable category, or at least no compelling state interest for the obvious differences. The latter was easily found in all these cases. *Robinson* went so far as to state that the

. . . state and the courts have a special solicitude for the welfare of children . . . (they) may become wards of the court simply to insure that they be provided with proper protection, maintenance, and education . . . . Education is not left to the discretion of the parent . . . (and) serves too important a function to leave it also to the mood—in some cases the low aspirations—of the taxpayers of a given district . . .<sup>15</sup>

Having established the de facto inequalities in expenditures, and the importance of education as an important function of the STATE, the next step is to find the necessary de jure action.

This was determined by various theories, the most important of which is called "fiscal neutrality." Without an actual workable definition, *Serrano* considered a violation of this relatively new theory as a "funding scheme that invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors",<sup>16</sup> found "no compelling state purpose necessitating this present method of finance," . . . and concluded that it "must fall before the equal protection clause".<sup>17</sup>

To the serious student of the law, this reasoning makes very little sense, in fact, it is blatantly illogical. However, it is unlikely this court was going to be overly concerned about legal technicalities—including logic and reason, since the thrust of the case was not directed to reason but to emotion. These judges saw a fiscal policy which is appropriate for rural 1920, but totally unsuited for 1970. It is more than a dinosaur, it is a fiscal monstrosity, so bad that no one had yet dared to rush in to kill this dragon. The *Serrano* court ignored

<sup>13</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1250 (1971); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234, 1238 (Wyo. 1971); *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 875 (1971); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

<sup>14</sup> *Serrano v. Priest* 96 Cal. Rptr. 601, 487 P.2d 1241, 1253 (1971); *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 875 (D. Minn. 1971); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972).

<sup>15</sup> *Robinson v. Cahill*, 118 N.J. Super 223, 287 A.2d 187, 216 (1972).

<sup>16</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1244 (1971); *cf. Van Dusartz v. Hatfield*, 334 F.Supp. 870, 875 (D. Minn. 1971); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 284 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972).

<sup>17</sup> *Id.*

"the law", and decided to use its power and authority to change a now bad law. The case spawned progeny even before it had matured.<sup>18</sup>

The rapidity with which the other judges grasped the Serrano decision as precedent, showed how much emotion was contained in the outmoded fiscal structure for modern education. Its financial support is based on an already outdated and overburdened local property tax, coupled with an inadequate and incompetent state aid formula designed for an early century type of educational structure and philosophy, and successively confused by political compromise.<sup>19</sup>

This impatience was again demonstrated in the judicial disregard (certainly not a misunderstanding) of the *de facto-de jure* distinction.<sup>20</sup> The decisions admit, correctly, the *de facto* situation. Then, they conclude without more, that the lines were drawn based on wealth.<sup>21</sup> What lines? Do they seriously suggest that those respective states actually carved out a series of cities, towns, counties and school districts with wealth as the criteria? What evidence was shown (or, in fact, could be shown) of such motivation? Is it a fact that the city-town lines in these states were just recently drawn? Or maybe the city lines "float" as the rich and poor migrate to and from districts.

Of course, these latter suggestions are specious, and used only to further evidence the emphasis on impatience and reform in these decisions, rather than THE LAW.

Nowhere was there evidence to show the responsibility of the states, as a matter of law, to subsidize or equalize local financing. Public schools have generally been mandated by the State as to their existence, but fiscal responsibility belongs to the local governmental units. The aid advanced by the states was more in the nature of gratuitous assistance than a constitutional mandate (i.e., if each state legislature decided to terminate all state aid, what then?).

Further, the cases indicated that possibility of the inapplicability of the Fourteenth Amendment if the state aid formula was strictly

<sup>18</sup> (In addition to those cited): *Troek v. Robinson*, No. .... (Mo., filed Nov. 10, 1971); *Hollins v. Shofstall*, No. C-253652 (Super. Ct. of Arizona, filed Jan. 13, 1972); *Pecacello School Dist. No. 25 v. Engelking*, No. 47055 (Idaho, filed Oct. 29, 1971); *Ohio Education Assoc. v. Gilligan*, No. 71-359 (U.S.D.C. Cincinnati, filed April 1972); *Martwick v. Illinois*, Chancery No. 72CH297 (Cook Co., filed May 1972); *Rupert Exton, CV No. 726-742* (U.S.D.C. Neb., filed May 1972).

<sup>19</sup> *Cf. Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 211 (1972).

<sup>20</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1254 (1971); *cf. Keyes v. School Dist. No. 1*, 313 F.Supp. 61, 74 (D. Col. 1971); *Bell v. School City of Gary, Indiana*, 324 F.2d 209, 213 (7th Cir. 1963); *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 61 (6th Cir. 1966); *Green v. County School Board of New Kent County*, 391 U.S. 430, 435 (1968); *United States v. Montgomery County Board of Education*, 395 U.S. 225, 228 (1969); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 224 (1964); *But see: San Francisco Unified School Dist. v. Johnson*, 92 Cal. Rptr. 309, 479 P.2d 669, 679 (1971).

<sup>21</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 610, 487 P.2d 1241, 1250 (1971); *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 876 (D. Minn. 1971); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 285 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 214 (1972).

per capita. This however would certainly not satisfy the judges. Although such enactment would be legal, the PROBLEM still remains. Since "the Constitution" was merely an excuse to reach a solution to a very bad problem, judicial ingenuity would certainly develop some new way to circumvent that potential checkmate.

An angry court will easily make statements as "... (the financing) invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."<sup>22</sup>; or, "... spending per pupil as a function of the school district's wealth violates the equal protection guarantee of the fourteenth amendment to the Constitution of the United States";<sup>23</sup> Sweetwater merely referred to the "inequality"<sup>24</sup> and then admitted it has "been considerably influenced by . . . *Serrano*";<sup>25</sup> *Rodriguez* believed that "... (education should not) be a function of the local property tax base";<sup>26</sup> or "... (education must be equal), it cannot be financed by a method that makes a pupil's education depend upon the wealth of his family and neighbors"<sup>27</sup>.

It would be hard to argue with the emotional appeal of these pronouncements, but difficult to find in these vague philosophical pronouncements any traditional legal basis except as a preamble to a law. Courts are more flexible than legislatures. They can make the vague social pronouncement, and then, by injunction, give it the force and effect of law. They did.

Having established this new legal principle, the law required a rationale to justify their decrees. The connection was the "compelling state interest" or "rational basis".<sup>28</sup>

Once there is a state action which on its face infringes on the constitutional right of an individual, a court will use either the "presumption of validity" test with the burden of proof on the petitioner, or the "compelling state interest" which puts the burden of proof on the defendant state. Reason dictates that the individual will pick the test that assures a pre-determined conclusion. Here, the latter test is the one that will produce the desired result.

In the application of the newly declared legal principle against the traditional tests of "compelling state interest" and "rational basis", the conclusion was never in doubt.

<sup>22</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 604, 487 P.2d 1241, 1244 (1971).

<sup>23</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 877 (D. Minn. 1971).

<sup>24</sup> *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234, 1237 (Wyo. 1971).

<sup>25</sup> *Id.* at 1238.

<sup>26</sup> *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 282 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972).

<sup>27</sup> *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 213, 214 (1972).

<sup>28</sup> *Serrano v. Priest*, 96 Cal Rptr. 601, 604, 487 P.2d 1241, 1244 (1971); *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 874 (D. Minn. 1971); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 214 (1972); *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 284 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972).

To give further rationality to the foregone conclusion, as indicated above the new legal principle has been propounded: "Wealth as a suspect classification".<sup>29</sup>

Although the fully homogenized society under big brother may be visible on the distant horizon, it is still a long way from *de facto* wealth distinctions to such differences now being *per se* suspect as a matter of law. It should come as a surprise to all persons whose income is above average, to find that they are now in a *de jure* "suspect class."

This latter classification was designed for shock value to make the comparison with the new legal principle more emphatic, and to make the rendered decree less susceptible to attack by the defendant State legislators (i.e. what politician could attack home, mom, baseball, apple pie, or invidious discrimination against the poor).

*Serrano*, and *Sweetwater*, being decisions of state Supreme Courts, are in a good position. The decrees are final and not subject to review. The only problem is legislative implementation. *Robinson* is more precarious, being the decision of an intermediate state court, whose efforts could suffer the insult and reversal of its neighbor *Spano*:

The issue posed by the plaintiffs here, as in *Serrano* . . . and *Van Dusartz* (etc.). . . Two recent *per curiam* decisions rendered by the U. S. Supreme Court . . . are controlling . . .

The abiding judicial realities are that these very challenges of unconstitutionality have recently been twice reviewed and rejected by the court. It is not within the competence of a *nisi prius* state court to presume to explain the Supreme Court's unexpressed thinking; its conclusions and holdings are sufficient unto themselves . . . that learned court does not require pronouncements from intermediary surrogates.

The applicable law is contained in *McInnis* and *Burruss*. If they are no longer to be controlling authorities, their demise should be proclaimed by The U. S. Supreme Court. Surely decisions so recently rendered should not be deemed hoary precedents, so attenuated by age as to be no longer viable—and, indeed, not by Special Term.<sup>30</sup>

*Van Dusartz* and *Rodriguez*, being decisions of federal district courts, are also in a precarious position. They have cited a State Court decision that MADE new law as precedent for their decree, and specifically rejected two United States Supreme Court decisions in point and contra, *McInnis*<sup>31</sup> and *Burruss*.<sup>32</sup>

<sup>29</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 610, 487 P.2d, 1241, 1250 (1971); *cf.* note 13 *supra*.

<sup>30</sup> *Spano v. Board of Educ.*, 40 U.S.L.W. 2475 (N.Y. Supr. Ct., Westchester County Jan. 21, 1972).

<sup>31</sup> *McInnis v. Shapiro*, 293 F.Supp. 327 (N.D. Ill. 1968); *aff'd. mem. sub. nom.*; *McInnis v. Ogilvie* 394 U.S. 322, (1969).

<sup>32</sup> *Burruss v. Wilkerson*, 301 F.Supp. 1237 (W. D. Va. 1968), 310 F.Supp. 572 (W. D. Va. 1969), *aff'd.* 397 U.S. 44, (1970).



In *Van Dusartz*, the court at least had the courtesy to allege that there was a difference in "issues"<sup>33</sup> before it accepted the *Serrano* theory as being "completely persuasive".<sup>34</sup>

The *Rodriguez* court took the position that the two Supreme Court cases are "distinguishable" since *McInnis* relied on "the nebulous concept of 'educational needs' which would have involved the court in the type of endless research and evaluation for which the judiciary is ill suited",<sup>35</sup> and *Burruss* relied on the "varying needs" of the students<sup>36</sup> [agreement, pro arguendo, as to the nominal differences in theories, does not change the parallel of facts in these cases].

Here, then, is a unique legal development. In 1969, there were three law review articles describing a theory on a new use for the Fourteenth amendment.<sup>37</sup> Next, a 1971 California Supreme Court decree which based its new legal theory on these law review articles, followed immediately by a federal district court<sup>38</sup> that rejected two U. S. cases in point and adopted the *Serrano* theory as its own. Then, another federal court<sup>39</sup> that cited the first two cases as legal precedent! Finally another State Court that cited these three prior cases as valid precedent!<sup>40</sup>

In all likelihood, at least the two federal decrees will be reviewed by their higher courts. Since the original theories and decrees are based on emotional mood, the Supreme Court's final position may similarly be on the basis of "mood" as it was in the historic *Brown* decrees, which eventually resulted in the use of federal troops to enforce the federal district court order against the State Governor and Legislature.<sup>41</sup> It is possible (but improbable) that it could happen again if the Supreme Court correctly interprets and captures the mood of the times.

After each court found the present system unconstitutional as a violation of the equal protection clause, they next went to the judicial remedy—injunctive relief.

*Serrano*, in fact, was technically a decision to "overrule the demurrers and allow defendants a reasonable time within which to answer."<sup>42</sup>

<sup>33</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 370, 377 (D. Minn. 1971).

<sup>34</sup> *Id.*

<sup>35</sup> *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 283 (W. D. Tex. 1971); *cert. granted*, 92 S. Ct. 2413 (1972).

<sup>36</sup> *Id.*

<sup>37</sup> *Introduction*, 82 HARV. L. REV. 1067 (1969); Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment* 83 HARV. L. REV. 7 (1969); Coons, Clune, Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969).

<sup>38</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 370 (D. Minn. 1971).

<sup>39</sup> *Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972).

<sup>40</sup> *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

<sup>41</sup> *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>42</sup> *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1267 (1971).

It did intimate that a more appropriate remedy was a new legislative scheme: "... a new system which is not violative of equal protection of the laws..."<sup>43</sup> There is little question that this is, for all practical purposes, a judicial "recommendation" to the legislature to act.

*Van Dusartz* was, similarly, a technical decision "... (ordering) the motions of defendants to dismiss (denied)." It then "... retain(ed) jurisdiction of the case, but will defer further action until after the current Minnesota Legislative session".<sup>44</sup> Again, an obvious, but still subtle, judicial HINT to the legislature for some form of legislative reform that "... allows free play to local effort and choice, and openly permits the state to adopt one of the many optional school funding systems which do not violate the equal protection clause".<sup>45</sup>

*Sweetwater* recommended a state-wide tax basis<sup>46</sup> and even made some suggestions: "While we do not mean to encroach upon prerogatives of the legislature, we think it might be helpful if we would suggest a passible method by which equal and uniform taxes can be accomplished for school purposes."<sup>47</sup>

*Rodriguez* was much less subtle, in fact, it was quite blunt. It ORDERED the "defendants ... permanently restrained and enjoined from giving any force and effect to (said) Article 7, § 3 of the Texas Constitution and the sections of the Texas Education Code relating to the financing of education ...".<sup>48</sup> It then stayed execution for a period of two years (to December, 1973) "to afford the defendants and legislature an opportunity to take all steps reasonably feasible to make the school system comply with applicable law. ...".<sup>49</sup> Then to be sure there was no misunderstanding it added "In the event the legislature fails to act within the time stated, the Court is authorized to and will take such further steps as may be necessary to implement both the purpose and the spirit of this order ... Needless to say, the Court hopes that this latter action will be unnecessary."<sup>50</sup> No one could seriously question that this is a judicial mandate. The only question is how the Texas Legislature will respond to such a mandate.

Finally, *Robinson*, after declaring the "present system ... unconstitutional",<sup>51</sup> at least made it prospective, and allowed the present system to "continue in effect unless and until specific operations under them are enjoined by court." It then stayed, in effect, until January 1, 1974 "... to allow time for legislative action. ...".<sup>52</sup>

<sup>43</sup> *Id.*

<sup>44</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 877 (D. Minn. 1971).

<sup>45</sup> *Id.*

<sup>46</sup> *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234, 1237 (Wyo. 1971).

<sup>47</sup> *Id.*

<sup>48</sup> *Rodriguez v. San Antonio Indep. School Dist.* 337 F.Supp. 280, 285 (W. D. Tex. 1971), cert. granted, 92 S. Ct. 2413 (1972).

<sup>49</sup> *Id.* at 286.

<sup>50</sup> *Id.*

<sup>51</sup> *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 217 (1972).

<sup>52</sup> *Id.*

All cases are similar in the sense that they have suggested or recommended legislative reform—or else!

Assuming the legislatures have received the message, it would be appropriate to conjecture on possible and probable legislative and popular reaction. To do this, certain assumptions will be made.

First, the local governmental tax districts are suffering from tax exhaustion—too many taxes, too fast, too much, complicated by a frustrating inflationary cycle. This condition leads to a sense of despair and helplessness. They have been convinced they cannot do it alone anymore—the State MUST help. (This generally would merely be a change of tax collecting, not true tax relief for the taxpayer. For some reason, the pain is not as great.)

Second, the local populace is not yet ready to accept the total big brother—Federal fiscal control of education. It is not so much that this will not happen, it is rather that this concept is not yet ready for popular acceptance. Possibly the next generation, after experience with State control, followed eventually by State tax exhaustion, will send out the relief call to the next higher tax unit, the Federal tax gatherer and bursar. Then, HEW, like a maiden blushing from the unexpected question, will reluctantly “consent” to ride to the fiscal rescue . . . and control.

Third, there is always the possibility that *Van Dusartz, Rodriguez* and *Robinson* will be overruled on an appeal. Even so, it will have little effect on the *Serrano* judicial progeny, as they will continue to multiply. [At this writing, cases have been filed in the State Courts of Arizona, Missouri, Illinois and Idaho, the Ohio and Nebraska Federal Court, and most likely in other places.]<sup>53</sup> *Serrano* will neither die nor fade away. It has performed its very essential function by giving life to an idea that was overdue for birth. *Serrano* said “ring out the old, ring in the new”, and the populace was ready. By now, the message has been received by every State Legislature. The parents of this new concept need only to maintain pressure. The Legislators must eventually provide some kind of relief.

Finally, it will be assumed that the “golden age” of local fiscal autonomy in education is apparently over. Phase two will be the State “golden age,” followed, of course, by the Federal “golden age.” The balance of this article will concentrate on the transition from “phase one” to “phase two”.

As to possible courses of legislative action, there appear to be three obvious generic possibilities.

First, and most obvious, the legislatures can ignore these judicial mandates. They can assume, for example, that these judges will not actually enjoin the entire financial operation of the educational sys-

---

<sup>53</sup> Cf. *supra* note 18.

terms and cause financial and educational disaster to the entire educational structure in the state. This appears to be a valid assumption, unless a judge believes it necessary to kill a patient to cure the disease. It is more probable that the judges are aware of this possible reaction to their bluff, but they too, have "two years" to find their "tertia alia".

Further, any such decrees will not be as easy to implement as the *Brown* decrees by the mere expediency of beckoning federal troops.<sup>54</sup> Whom are the troops to fight? The Texas Legislature? Will the New Jersey State Police put the New Jersey legislature under house arrest?

In the event that non-action does occur, it is most likely that it will be the result of the legislators meeting the same frustration expressed by the judges when they confessed they knew no answer, and quickly handed the problem to the legislatures. It is unlikely that the legislators can find a workable solution in only "two years".

It is also unlikely that any inaction will be deliberate. The gravity of the situation has been dramatically shown, and it will be the very rare legislator that will not rise to the occasion.

This is probably the real intent behind these dramatic but impractical decisions and decrees.

Second, is the possibility of minimal reform only. This would be a relatively easy step at the state level. The decrees indicated impatience with the invidious discriminations—thus, the State merely switches to non-invidious discriminations, or no discriminations at all. The latter is easy: there will be no state aid at all (unlikely); or state aid will be on a per pupil (per capita) basis. This rhetoric solves the equal protection problem but not the real problem. After all the work, bluff, and risk of these judicial decrees, it is unlikely the legislators will be allowed to escape so easily, except maybe for the short term in the spirit of *Griffin* and *Green*, until judicial patience wears thin.<sup>55</sup>

Since these cases somewhat follow the civil rights-desegregation cases, it may be expected that many legislators will seek a remedy that was appropriate for those desegregation cases. It is reasonable to expect suggestions for school district realignment (from city control to district or county, or multiple county districts—which may relieve the pressure, but merely postpone the solution); or bussing on a grander scale than has ever been attempted before (more money spent on busses than on education); or even a zoning arrangement to match all economic, racial, ethnic, and religious interests<sup>56</sup> (such a zone would, of course, be in the shape of a thin, twisted snake, four miles long and two yards wide); or pairing, freedom or choice, or possibly even a voucher system.

---

<sup>54</sup> *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>55</sup> *Cf. Green v. County School Board*, 391 U.S. 430 (1968); *Griffin v. County School Board*, 377 U.S. 218 (1964).

<sup>56</sup> *Cf. G. LA NOVE, EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES* 87 (1972).

Certainly, nothing will be wrong with such educational experimentation,<sup>57</sup> but these devices will start out with a poor track record, and will be a temporary expediency at best, which will only delay the inevitable. "Inevitable", as used here, means

... that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole. For convenience we shall refer to this as the principle of 'fiscal neutrality', a reference previously adopted in *Serrano*.<sup>58</sup>

The former (non-invidious discriminations) is more likely to be acceptable to the judiciary, but more difficult to gain the acceptance of the voting TAXPAYER. In essence the idea would be to utilize ONLY the equalization grants. This will be discussed in more detail later.

The third possibility is complete State control, where the State would set not only the level of aspiration but the level of spending in each district according to a student per capita formula, or "as needed" basis which basically means a higher level of spending for poorer districts and inner city areas.<sup>59</sup> Assuming the State taxpayers would permit this, it will inevitably mean a boom for the private (and parochial) schools, as it is highly unlikely that the now educationally underprivileged upper economic classes will tolerate the typical low level of aspiration mandated by a big brother who traditionally seeks the low level of homogenized mediocrity.<sup>60</sup>

Variations of absolute state control may be shown by utilization of the data on Table I.

One method available to the State would be to equalize the valuations, line (a), on a statewide level. Then, either district A will have its valuations equalized at \$8,000, or District C will be equalized at \$60,000, or both districts will be equalized at \$25,000, with the average district B.

Obviously there is little value in playing any interesting numbers game with line (a) (equalized valuations). Solutions at that line could only cause more trouble than they would solve. A brief contemplation of the implications of any manipulations of the above proposals will show their impracticality. The variation of the millage only, line (b), as shown by Table II, will produce an increase in available revenue. For the state to meddle here, would require an equal millage rate, putting it all back to Table I, or an unequal millage rate,

<sup>57</sup> *U.S. v. Montgomery County Board of Education*, 395 U.S. 225, 234 (1969); *Green v. County School Board*, 391 U.S. 430 (1968); *Swan v. Charlotte Mecklenberg School Dist.*, 402 U.S. 1 (1971).

<sup>58</sup> *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 877 (D. Minn. 1971). *Cf. Rodriguez v. San Antonio Indep. School Dist.*, 337 F.Supp. 280, 284 (W. D. Tex 1971), *cert. granted* 92 S. Ct. 2413 (1972); *Robinson v. Cahill*, 118 N.J. Super, 223, 287 A.2d 187, 215 (1972).

<sup>59</sup> *Cf. Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 213 (1972); *McInnis v. Shapiro*, 293 F.Supp. 327, 332 (N. D. Ill. 1968).

<sup>60</sup> *McInnis v. Shapiro*, 293 F.Supp. 327, 336 (N. D. Ill. 1968); *Van Dusartz v. Hatfield*, 334 F.Supp. 870, 876 (D. Minn. 1971).

as shown in Table II, which would then be both state imposed and invidious to someone else.

The type of unequal equality that would satisfy the courts would be the reverse of the Table II revision, i.e., district A would be taxed at 40 mills, and district C at 20. This would produce \$1,200 more from the district A taxpayers than they could use. Since the State is the new tax collector, it creates no problems for district A as to surplus funds. The State merely redirects this surplus into districts B and C, through manipulations of line (g).

Here, everyone is satisfied except the district A taxpayer whose taxes have just doubled with no direct benefit to him. This is only a slight problem however, since being a member of a "suspect class", it may be assumed that his arguments and protests are also suspect. Even so, it is hardly likely that the State Representatives from these districts will approve of this type of socialistic homogenization without some kind of struggle.

Lines (a) and (b) do not hold a potential solution. Line (c) is a mere total. Line (d) is a level of aspiration figure which will be solely the result of statistical study and political compromise with every political candidate promising to raise the level much as is done now with social security benefits. There is no SOLUTION in line (d), only a guideline, with more political problems and dreams. Line (e) is the legislators compromise between the level of aspiration (line d) and ability of a legislator to tread that thin line between legislative ability to soak the taxpayer but still get re-elected. At best, line (e) is the vehicle for implementation of a solution, but not a locale for finding a solution.

Line (f) must be eliminated. All cases agree that this per capita state action "invidiously discriminates against the poor." As an initial step in any proposal, line (f) must be reduced to zero.

Since the whole idea is to make line (h) as equal as possible, the only remaining area available for remedy is line (g), the equalizing grant.

The most obvious procedure in an equalization remedy is to provide minimum (if any) aid to district A, and maximum aid to district C. The amount would not necessarily be an amount to bring district C up to district A's \$1,200, but rather, to a level considered adequate for a basic instruction level—the level of aspiration. This is not inconsistent, as all five of these decisions, with *McInnis* added for weight, admit that they do not recommend or require equal per pupil expenditures.<sup>61</sup>

<sup>61</sup> *McInnis v. Shapiro*, 293 F.Supp. 327, 335 (N. D. Ill. 1968); *Serrano v. Priest*, 96 Cal. Rptr. 601, 487 P.2d 1241, 1249 (1971); *Van Duzart v. Hatfield*, 334 F.Supp. 870, 876 (D. Minn. 1971); *Rodriguez v. San Antonio Indep. School Dist.* 337 F.Supp. 280, 283 (W. D. Tex. 1971), *cert. granted*, 92 S. Ct. 2413 (1972); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187, 213 (1972).

As a first step, this would appear to be the most practical approach, as it will bring a measure of relief to the local tax districts, and remove the invidious discriminations. [It will not however bring relief to the taxpayer.] It will allow the local district the option of self imposed taxes above the state level of spending to satisfy the local levels of aspirations above the level of aspiration set by the state.

To be sure, the question of mechanical implementation is relatively easy compared to the legislative problem as to the source of the extra revenue. But then, there is no reason why this author cannot be as cavalier as the courts and refer that problem to the legislature, except to suggest a possible solution would be the application of the progressive income tax to the real property tax rate, not to assessments.

"The road to fiscal equality in education may be more tortuous than the one that leads toward racial integration in education".<sup>62</sup>

---

<sup>62</sup> FUTURE DIRECTIONS FOR SCHOOL FINANCING, *supra* note 10, at 59.